Supreme Court of the United States

OCTOBER TERM, 1950

NO. 369

O. G. CARROLL and ANGELA J. CARROLL, husband and wife,

Petitioners,

vs.

LAURETTA KELLY, as administratrix of the estate of Morris C. Kelly, deceased,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF FOR THE RESPONDENT

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PRELIMINARY STATEMENT

The complaint in this action sets out various negligent acts of a drugless healer, O. G. Carroll, constituting malpractice. Only part of the alleged acts of negligence would require proof by expert testimony. (R. 1-6).

The case was submitted to the jury upon instructions which are not before this Court. No exceptions to these instructions are before this Court.

A statute of the State of Washington permits drugless healers to administer to patients within prescribed limits. A prior decision of the Supreme Court of Washington held that within the limits of practice permitted to drugless healers, their relationship to their patients was the same as that of physician and patient, but did not enlarge the limits of drugless healing practice.

In the instant case a judgment of malpractice was entered on a jury's verdict against petitioner, a drugless healer, for negligent treatment of respondent's husband suffering from appendicitis resulting in his death. (R-13). Petitioners insisted, on trial, that testimony be limited to that of drugless healers. (R. 80-84).

On appeal the Supreme Court of Washington affirmed and held that the statute prohibited drugless

healers from treating medical cases, that it was negligence for petitioner to attempt to treat appendicitis instead of referring the case to a medical doctor as soon as he should have suspected that the patient was suffering from appendicitis; that under the statute such healers are not doctors and can not testify as experts on a medical question. (R. 14-31).

Petitioners petitioned for a rehearing to grant them a new trial. (R. 33-77).

The petition for rehearing was denied without any opinion. (R. 79).

Petitioner in the present proceeding urges that the Supreme Court of the State of Washington should be required to consider his petition in that Court as if expert testimony of his drugless healers were admissible on medical questions, or grant him a new trial in which he might conceivably produce expert testimony in his favor from medical doctors.

Respondent contends:

a. That no federal question is involved.

b. That there is nothing to show that the petition for rehearing to grant a new trial was not based entirely upon non-federal grounds.

c. That there is no special or important reason in this case compelling the Supreme Court of the United States to assume jurisdiction.

NO FEDERAL QUESTION

There is no Federal Question upon which this Court can pass

1. Because no former decision was overruled by the State Supreme Court.

2. Because the theory upon which the case was tried to the jury was not before the State Supreme Court.

3. Because the claim to the State Court that a constitutional right had been invaded was entirely too general to be considered.

4. Because the principle of stare decisis has no application to matters within the police power of the State.

NO FORMER CASE OVERRULED

Prior to this decision the Supreme Court of the State of Washington had ruled that the conduct of a drugless physician, when practicing within the limits of his license, should be measured in a malpractice case by the standards of his own school of healing. In such cases, only those of his own school might qualify as experts. But the Supreme Court had never decided that this rule would apply in a malpractice action to a drugless physician who was practicing beyond the limits of his license. By statute, a drugless physician is limited to a practice that does not include

surgery or the prescribing of medicine. In the case at bar petitioner, O. G. Carroll, was found to have been caring for an appendicitis patient who required medical and surgical attention. Petitioners were also found to have prescribed two doses of castor oil of four tablespoons each as well as other laxatives. These facts, among others, having been found, the Supreme Court held in the case at bar that no drugless physician could qualify as an expert because the facts showed that said O. G. Carroll was not practicing within the limits of his license. (R. 14-33). The Supreme Court further in the case at bar held that a drugless physician is required to refer immediately to an M. D. any of his patients who require medical attention. The basis of this rule had been shown in criminal cases wherein drugless physicians had been charged with practicing medicine or surgery. In these cases, medical doctors and surgeons, licensed as such, had been permitted to testify as experts. It is not necessary to analyze these cases here since the Supreme Court in the case at bar analyzed them and chose to follow them. (R. 17-22). The Court does not state that it is overruling any former decision. As we have stated, no former decision is thereby overruled. Opinions in former malpractice cases are merely held not to cover those cases where a drugless physician is practicing beyond the limits of his license by invading the field of medicine, and the rule in malpractice cases is made to conform with the rule in

criminal cases. Such a decision does not offend against the rule of stare decisis nor is any vested right of appellants invaded. No federal question exists.

In the case of *Brooks v. Herd,* 144 Wash. 173, 257 Pac. 238, relied upon by petitioners, the Court says:

> "In general, the court submitted the case to the jury upon perfectly proper instructions as to the law governing the relations of physicians and patients. Under the statutes above cited, drugless healers are strictly limited, each to his own school of practice, and forbidden to invade the field of practice of any other school of drugless healing or of any regular school of healing. *Otherwise,* the principles of law governing the relations of regular physicians and surgeons and their patients govern as to drugless healers and their patients. *Wilcox v. Carroll,* 127 Wash. 1, 219 Pac. 34." (Italics ours.)

By use of the word "Otherwise" in the last quoted sentence, the Court is very careful to indicate that different principles of law would or might apply in a case where a drugless healer had invaded a forbidden field of practice. It certainly does not indicate that in such a case the same rules would apply. By citing *Wilcox v. Carroll,* supra, as authority for this statement, it is also evident that, in the mind of the Court, that case is not authority for any different interpretation of the law. In the field where drugless physicians are permitted to practice, instructions may give them the benefit of the same rules that govern

medical doctors and their patients. Outside those limits, other rules must apply. Because of the peculiar manner in which these cited cases were submitted to the jury, only the general rule was therein considered.

We do not know in the case of *Brooks v. Herd*, supra, if testimony of medical doctors was offered or objected to or refused. That would not be apt to appear in the Supreme Court record except upon the appeal of the plaintiff. In this case the appealing party was the drugless physician who would not be found complaining upon any such ground. At any rate, the record does not show that any such matter was presented to the Court.

Fritz v. Horsfall, 24 Wash. (2d) 14, 163 Pac. 148 is an action in malpractice against a physician and surgeon, not a drugless healer, and is not therefore in point.

FEDERAL CLAIM TOO LATE

The attempt of petitioners to claim that a constitutional right had been invaded first occurred in their petition to the Washington Supreme Court for a rehearing. (R-35). This was too late according to the general rule. There is an exception to the general rule which permits the United States Supreme Court, nevertheless, to assume jurisdiction where a new basis of claim arises out of the decision of the State Supreme

Court, provided that the decision could not have been anticipated. The State Supreme Court points out that Remington's Revised Statutes, Section 10124 prohibits the drugless healer from designating himself as a doctor. (R-16), that drugless healers were convicted of practicing medicine in the following cases: *State v. Lydon,* 170 Wash. 354, 166 P. (2d) 848; *State v. Karsunky,* 197 Wash. 87, 84 P. (2d) 390; *State v. Hauck,* 32 Wn. (2d) 681, 203 P. (2d) 693, (R. 18-21); that in at least one of these cases medical doctors furnished most of the expert testimony. We have pointed out that previous malpractice decisions did not expressly cover a case where the Court had instructed concerning the conduct of a drugless physician, practicing beyond the limits of his license. Considering the statute and the holdings of the Court relating to drugless physicians, it would seem that a careful attorney should have anticipated the Court's decision. If the decision should have been anticipated then there is no federal question before this Court of which it will assume jurisdiction. *Herndon v. Georgia,* 295 U. S. 441, 79 L. ed. 1530, 55 S. Ct. 794, *Brinkerhoff-Faris Trust & Savings Co. v. Walter O. Hill,* 281 U. S. 673-682, 74 L. ed. 1107, *Great Northern Railway Co. v. Sunburst Oil & Refining Co.,* 287 U. S. 358-367, 77 L. ed. 360.

In *William Baldwin v. State of Kansas,* 129 U. S. 52, 32 L. ed. 640, the Court says:

"If the right was not set up or claimed in the proper Court below, the judgment of the highest court of the State in the action is conclusive so far as the right of review is concerned.

"The question whether the evidence in the case was sufficient to justify the verdict of the jury and the question whether the constitution of the State of Kansas was complied with or not in the proceedings on the trial which are challenged are not federal questions which this court can review."

THEORY ON WHICH CASE WAS TRIED TO JURY NOT SHOWN

Furthermore, it is incumbent upon petitioners to show under what theory the case went to the jury before they can claim that it was tried upon a wrong theory. The opinion of the Supreme Court sets out various instructions to the jury requested by petitioners and refused by the trial Court. (R. 24-28). These instructions were held rightly rejected because they would have told the jury that the conduct of petitioner, Carroll, although he was practicing beyond the limits of his license, should be measured only by the standards of his own school. These were the only instructions considered by the State Supreme Court or called to its attention. They no doubt show that petitioners sought to have the case tried on that theory. But is that sufficient to show on what theory or pursuant to what instructions the case was submitted to the jury? There is nothing in the record that shows that the

State Supreme Court ever had called to its attention instructions that were actually given by the Trial Court to the jury. Even in petitioners' petition for a rehearing the attention of the State Supreme Court is not called to instructions to the jury given by the Trial Court. Under our practice in the State of Washington questioned instructions must be quoted in full in order to be passed upon by the Supreme Court. *State of Washington v. Harry Severns,* 13 Wn. (2d) 542, 125 P. (2d) 659; *Gephart v. Stout,* 11 Wn. (2d) 184, 118 P. (2d) 801. Petitioners did not quote any instructions and did not point to any instructions in their petition for a rehearing. The theory upon which the case was tried to the jury therefore was not before the State Supreme Court. Neither is it before this Court. The mere claim of petitioners that the case was tried upon a certain theory fails to establish that it was tried upon that theory. No federal question is therefore before this Court.

CLAIM TOO GENERAL

The only place in petitioners' petition for rehearing and in fact the only place in the entire record where the constitution of the United States is even mentioned, appears in Paragraph I of their petition for rehearing before the Supreme Court of the State of Washington. (R-35). The reference is as follows:

"The opinion completely ignores the doctrine

> of stare decisis and in this case the failure to recognize the doctrine deprived the appellant of the fair and impartial trial guaranteed by the constitutions of the United States and the State of Washington."

At several points in the petition for rehearing there is the statement that "appellant did not have his constitutionally guaranteed right of a fair and impartial trial," but there is no further reference in the entire petition to the constitution of the United States. Other than as quoted, there is nothing to indicate whether the constitutional right, which appellants allege was invaded, was one established by the State of Washington or by the United States. There is no section of the constitution of the United States referred to. The claim therefore was entirely too general for consideration by the Court and no federal question was raised.

Maxwell v. Newbold, 18 How. 511, 15 L. ed. 506; *Hoyt v. Shelden,* 1 Black 518, 17 L. ed. 65; *Farney v. Towle,* 1 Black 350, 17 L. ed. 216; *Capital City Dairy Co. v. Ohio,* 183 U. S. 238, 46 L. ed. 171, 22 Sup. Ct. Rep. 120.

New York C. & H. R. R. Co. v. New York, 186 U. S. 269, 46 L. ed. 1158, 22 Sup. Ct. Rep. 916.

Clarke v. McDade, 165 U. S. 168, 41 L. ed. 673, 17 Sup. Ct. Rep. 284.

Chicago & N. W. R. Co. v. Chicago, 164 U. S. 454, 41 L. ed. 511, 17 Sup. Ct. Rep. 129; *Schuyler Nat.*

Bank v. Bullong, 150 U. S. 85, 37 L. ed. 1008, 13 Sup. Ct. Rep. 24; *Manning v. French,* 133 U. S. 186, 33 L. ed. 582, 10 Sup. Ct. Rep. 258; *Worthy v. Moore County,* 9 Wall, 611, 19 L. ed. 565; *Johnson v. New York L. Ins. Co.* 187 U. S. 491, 47 L. ed. 273, 23 Sup. Ct. Rep. 194; *Sayward v. Denny,* 158 U. S. 180, 39 L. ed. 941, 15 Sup. Ct. Rep. 777; *Morrison v. Watson,* 154 U. S. 111, 38 L. ed. 927, 14 Sup. Ct. Rep. 995; *French v. Hopkins,* 124 U. S. 524, 31 L. ed. 536, 8 Sup. Ct. Rep. 589; *California Powder Works v. Davis,* 151 U. S. 389, 38 L. ed. 206, 14 Sup. Ct. Rep. 350; *Onondaga Nation v. Thacher,* 189 U. S. 306, 47 L. ed. 826, 23 Sup. Ct. Rep. 636.

POLICE POWER AND STARE DECISIS

Assuming that the theory on which the case was tried is before this Court and that former decisions were overruled by the State Court, still there would be no federal question involved. The State Court has the power to overrule its own decision.

Henry C. King v. W. Va., 216 U. S. 90, 54 L. ed. 396.

Moore-Mansfield Construction Co. v. Electrical Installation Co. 234 U. S. 617, 58 L. ed. 1503.

Smith v. State of Miss., 162 U. S. 591, 40 L. ed. 1082.

Wood v. Brady, 150 U. S. 17, 37 L. ed. 981.
Cleveland & Pittsburgh R. R. Co., et al v. City of

Cleveland, Ohio, 235 U. S. 50, 59 L. ed. 127.

Petitioners had no vested right in rules governing the competency of witnesses.

Central Pac. R. R. Co. v. People of the State of California, 162 U. S. 90, 40 L. ed. 903.

J. Thomburn Ross v. State of Oregon, 227 U. S. 149, 57 L. ed. 458.

Frank J. Willoughby v. City of Chicago, 235 U. S. 44, 59 L. ed. 123.

We quote from 36 C. J. S., P. 172:

> "A decision of a State Court with respect to a question of evidence will not be reviewed by the Supreme Court of the United States, unless a Federal question is involved.
>
> "The United States Supreme Court cannot ordinarily review a decision of a State Court as to the propriety of taking or refusing to take judicial notice of a particular matter or the admissibility of sufficiency of evidence."

We quote from 11 Am. Jur. P. 1202, Sec. 374:

> "In general, no such thing as a vested right in a rule of evidence is recognized."

The police power of the state has always included the right to determine the qualifications of those who care for the sick and to limit licenses to those only who have met such qualifications. A license therefore is as necessary to qualify as an expert witness as it is

to be permitted to treat the sick. Since it is not claimed that anyone able to meet the test necessary to obtain a medical license is denied the right to obtain such license, no federal question is here involved.

The principle of stare decisis has no application to the police power:

> *Schmidt v. F. W. Cook Brewing Co.* (Ind.) 3 A. L. R. 270.

NON-FEDERAL GROUNDS

The petition of petitioners for a rehearing was essentially a petition for a new trial. It was denied by the Washington Supreme Court without stating the reasons for the denial. Unless the judgment granting or denying a new trial states the specific ground upon which it is based, then the Appellate Court will not reverse such judgment if it could be supported upon any ground.

> *Machenheimer v. Falknor,* 151 Wash. 447, 276 P. 297.
>
> *Shook v. Hughes,* 146 Wash. 134, 262 P. 142.
>
> *Applewhite v. Wayne,* 152 Wash. 62, 277 P. 84.

It must appear that the decision could not have been made under the rules of general jurisprudence broad enough in themselves to sustain the judgment

without considering the alleged federal question. *Eustis v. Bolles,* 150 U. S. 361, 37 L. Ed. 1111, 14 S. Ct. 131; *Connecticut ex rel New York and N. E. Railway Company v. Woodruff,* 153 U. S. 689, 38 L. Ed. 869, 14 S. Ct. 976; *Rogers v. Jones,* 214 U. S. 196, 53 L. Ed. 965, 29 S. Ct. 635.

> "A judgment will not be reversed because of error in giving or refusing instructions when the verdict rendered is manifestly in accordance with the evidence."
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> *Kellogg v. Cook,* 18 W. 516, 52 P. 233.
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> *Hardin v. Mullin,* 16 W. 647, 48 P. 349.
>
> *Gray v. W.W.P. Co.,* 30 W. 665, 71 P. 206.
>
> *Grass v. City of Seattle,* 100 W. 542, 171 P. 533.

Petitioner, O. G. Carroll, admitted upon the trial that he applied the sine wave massage machine with too much violence for an appendicitis case; admitted that moving an appendicitis patient is bad and that such a patient who is not moved would be more apt to recover; that an appendicitis patient who is given food would be less apt to recover. (R. 84-86). The patient involved was given such treatment. No expert testimony was therefore required to prove these facts. They stand admitted. In denying a demand for a rehearing to grant a new trial the Supreme Court could well have decided that with all these admissions in the record no different decision could be arrived at upon

a subsequent trial and that the verdict was manifestly in accordance with the evidence irrespective of any expert testimony.

Petitioners in their petition for a rehearing set up six grounds therefor. One of these grounds, the 5th, concerned their belief that the giving of castor oil, which was alleged in the complaint as a ground of negligence, does not constitute the practice of medicine. (R-37). Whether or not the giving of castor oil constitutes the practice of medicine under the Washington statutes is purely a question of state law. There had never been any decision of our court holding it did not constitute the practice of medicine. Petitioners' witness, Spitler, a drugless physician, who, they claim, is also an M.D., testified that the giving of four tablespoonsful of castor oil would be very bad for an appendicitis patient. (R-86). But the Court could have taken judicial notice of that fact. The Court also could have based its refusal to grant a new trial on this point without any reference to the question raised herein.

Among other allegations of negligence contained in the complaint was an allegation that petitioner O. G. Carroll left the city and thus negligently absented himself from his patient at a time when his patient was critically ill. (R-5). Evidence to that effect did not require expert testimony. The Supreme Court could have refused a new trial on that ground with-

out passing upon the alleged constitutional question raised by petitioners.

One of the grounds upon which the petition for rehearing to grant a new trial was based was the contention of petitioners that the Court could not take judicial notice that appendicitis is a disease requiring the care of an M. D. (R-36). It requires no testimony, medical or otherwise, to prove that of which the Court takes judicial notice. It would be impossible, therefore, for the appellants to be injured by the failure of the Court, if there was such failure, to consider expert testimony concerning the matter. Liability for malpractice would follow when it was shown that a drugless physician was treating a medical case. The constitution does not prohibit a state court from taking judicial notice of any generally known fact.

See *Norman S. Wear v. State of Kan. ex rel S. W. Brewster,* 245 U. S. 153, 62, L. Ed. 214.

Respondent contends in her complaint, among other acts of negligence, that petitioners were negligent in failing to refer her husband's case to a medic and instead telling her repeatedly that she did not need an M. D. and if she got one such M. D. will kill her husband. (R. 2-3). The jury found with her. The Supreme Court also found that petitioner, O. G. Carroll, was guilty of negligence and of malpractice in failing to refer the case to an M. D. This holding was

based upon the fact that Carroll was not licensed to care for a medical case. It required no expert testimony to prove this fact.

Petitioners objected upon the trial to the jury to any expert testimony by medical doctors. (R. 80-84). Neither instructions given nor exceptions thereto appear. It is very evident that petitioners considered it beneficial to shut out medical testimony. So they invited erroneous rulings of the Court. They requested that testimony of their drugless healer witnesses be presented to the jury as expert testimony. Some of the testimony of medical witnesses offered by respondent was, upon appellants' objection, ruled out. Now that the Supreme Court has determined that the drugless healer witnesses were not entitled to give expert testimony in a medical case, and, having lost out, petitioners seek a new trial. It has always been the law that a new trial will not be granted because of erroneous rulings unless those rulings be prejudicial. *State v. Sterling,* 147 Wash. 222, 265, Pac. 472; *Fisher v. Berg,* 158 Wash. 176, 290 Pac. 984. The trial objections of petitioners to medical testimony show that if any erroneous instructions were given they themselves did not consider them prejudicial. They wanted rulings to that effect. Not only would such instructions not be prejudicial, they would be invited. Rulings cannot be questioned on appeal, if not excepted to. *Hawkins v. Casey,* 38 Wash. 625, 80 P. 792; *State v.*

McCann, 16 Wash. 249, 47 P. 443; *Schlotfeldt v. Ball,* 18 Wash. 64, 50 P. 590. The Supreme Court, therefore, could have denied a new trial upon this ground which would not have involved any federal question.

The State Supreme Court could have granted a new trial also on its own motion if the judges had believed that petitioners had not had a fair trial. It was equally in its power to deny a new trial where the error complained of would be advantageous to those complaining, was invited by them and was not excepted to by them. It seems to be the rule of all Courts of record that error may not be invited and must be duly excepted to in order that any advantage thereof may be taken on appeal. Such rules do not invade any constitutional right.

NO IMPORTANT REASON TO ASSUME JURISDICTION

U. S. Supreme Court Rule 38, Section 5, provides that

> "A review on writ of certiorari is not a matter of right but of sound discretion and will be granted only where there are special and important reasons therefor."

In the case at bar the Supreme Court of the State did not establish any rule with respect to stare decisis not in accord with the applicable decisions of the fed-

eral courts. The state decision extended, but did not reverse, any former decision.

There is no special or important reason why the federal court should assume jurisdiction. It is important, if at all, only to petitioners, but it is not of importance even to them since if the trial court did instruct the jury on the wrong theory (which we insist has not been shown), that theory would have been favorable to petitioners and they could not have been injured thereby. Could you be convinced that appellants would be favored, before a jury, by having their conduct of an appendicitis case judged by medics as experts instead of by their own school? They show by their own objections to medical testimony on cross-examination that they did not wish to permit medics to testify. (R. 80-84). Such a record does not present any reason sufficiently special or important to warrant the federal court to assume jurisdiction. See re *Woods* 143 U. S. 202, 36 L. Ed. 125, 12 Sup. Ct. Rep. 417. *Forsyth v. Hammond,* 166 U. S. 506, 41 L. Ed. 1095, 17 Sup. Ct. Rep. 665.

The petition should be dismissed.

Respectfully submitted,

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